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In The

Supreme Court of the United States

October Term, 1949

No. 677

DAVE LEE DOVER,
Petitioner,

vs.

THE STATE OF NORTH CAROLINA,
Respondent.

Brief of the State of North Carolina, Respondent, Opposing Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The defendant was tried at the April 25th Term, 1949, of the Superior Court of Gaston County, North Carolina, and was convicted on a charge of the unlawful possession of intoxicating liquor for the purpose of sale. Upon this conviction, he was given a sentence of 12 months. He appealed to the Supreme Court of North Carolina, and on the 26th of November, 1949, by *per curiam* order, the Supreme Court dismissed the appeal "for failure of case on appeal to state clearly and number the exceptions, and for failure of the brief to state clearly the questions involved." Reference to the order of dismissal is reported in Volume 231 N. C. (Advance Sheets No. II, page iii, issued the 9th of December, 1949). A copy of this order appears in the Appendix herein on page 8.

ARGUMENT

I

THE SUPREME COURT IS WITHOUT JURISDICTION TO GRANT THE WRIT OF CERTIORARI, FOR THE REASON THAT THE PETITIONER FAILED TO SET UP IN THE STATE COURT A CLAIM OF RIGHTS, PRIVILEGES, OR IMMUNITIES UNDER THE CONSTITUTION OF THE UNITED STATES.

Careful examination of the Record will show that, although the Petitioner took exceptions to alleged errors of law, he failed entirely to set up specially any rights, privileges, or immunities claimed under the Constitution of the United States in either the trial court or the Supreme Court of North Carolina. The petition for writ of *certiorari* filed in this Court omits any allegation that Federal questions were set up as such in the State courts.

Under the statute authorizing review by *certiorari* of decisions of the highest courts of the several states, jurisdiction of the United States Supreme Court to review decisions alleged to involve rights, privileges, or immunities under the Constitution is limited to cases in which the rights, privileges, or immunities are "specially set up or claimed."

28 U. S. C. 1940 ed., Sec. 344.

The rights, privileges, or immunities must be set up in the State courts.

BROOKS v. MISSOURI, 124 U.S. 394, 31 L. ed. 454;

HARTFORD LIFE INS. CO. v. JOHNSON, 249 U.S. 490, 63 L. ed. 722;

KEOKUK & HAMILTON BRIDGE CO. v. ILLINOIS, 175 U.S. 626, 44 L. ed. 299;

MUTUAL LIFE INS. CO. OF NEW YORK v. McGREW, 188 U.S. 291, 47 L. ed. 480.

II

WHETHER AN EXCEPTION OR ASSIGNMENT OF ERROR IS PROPERLY PRESENTED TO A STATE COURT PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

Whether or not a question is properly presented to a state court for decision should be determined by applying state laws and rules of court.

BUENA VISTA COUNTY v. IOWA FALLS, ETC., R. R. COMPANY, 112 U.S. 177, 28 L. ed. 680;

TARRANCE v. FLORIDA, 188 U.S. 519, 47 L. ed. 572;

DELMAR JOCKEY CLUB v. MISSOURI EX REL. ATTORNEY GENERAL, 210 U.S. 324, 52 L. ed. 1080;

MARIA MATHESON v. THE BRANCH BANK OF THE STATE OF ALABAMA, 7 Howard 258, 12 L. ed. 692;

JOHN v. PAULLIN, 231 U.S. 583, 58 L. ed. 381.

III

THE QUESTION OF THE SUFFICIENCY OF AN INDICTMENT FOUND IN A STATE COURT IS NOT A FEDERAL QUESTION.

Whether an indictment is sufficient under the Constitution and laws of a state is not a Federal question.

BARRINGTON v. MISSOURI, 205 U.S. 483, 51 L. ed. 890;

RE ROBERTSON, 156 U.S. 183, 39 L. ed. 389;

BROOKS v. MISSOURI, 124 U.S. 394, 31 L. ed. 454.

IV

THE SUFFICIENCY OF THE EVIDENCE TO BE SUBMITTED TO THE JURY PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

When a state court judicially determines that there is sufficient evidence of fact to be submitted to the jury, its decision is not reviewable by the United States Supreme Court on writ of *certiorari*.

NOBLE v. MITCHELL, 164 U.S. 367, 41 L. ed. 472;

AMERICAN RAILWAY EXP. CO. v. KENTUCKY, 273 U.S. 269, 71 L. ed. 639;

BELL TELEPHONE CO. v. PENNSYLVANIA PUBLIC UTILITY COMMISSION, 309 U.S. 30, 84 L. ed. 563.

In BELL TELEPHONE CO. v. PENNSYLVANIA PUBLIC UTILITY COMMISSION, 309 U.S. 30, 32, 84 L. ed. 563, it is stated in a *per curiam* opinion:

> "As to the first contention, it appears that the state court heard the appeal judicially and decided that there was evidence justifying the finding of the Commission of unreasonable discrimination in the transaction of its intrastate business. In the absence of other constitutional objections, it cannot be said that a state court denies due process when on appropriate hearing it determines that there is evidence to sustain a finding of the violation of state law with respect to the conduct of local affairs. The contention that such a decision is erroneous does not present a federal question."

The following paragraph from the opinion of Justice White in NOBLE v. MITCHELL, 164 U.S. 367, 373, 41 L. ed. 472, would seem to be decisive of the question:

> "It is suggested that there is no adequate proof that the policy in controversy was issued by a foreign corporation. This involves a mere question of fact, which was submitted to the jury by the trial court, and as to which the Supreme Court of Alabama said there was evidence sufficient for the consideration of the jury, and which is not subject to review here on writ of error. DOWER v. RICHARDS, 151 U.S. 659 (38:306); RE BUCHANAN, 158 U.S. 31 (39:884)."

If it should be determined that the Supreme Court of North Carolina erroneously decided the case, no question would be presented for determination by this Court for it

has long been held that where a party is fully heard in the regular course of judicial proceedings, an erroneous decision of the state court is not a denial of due process within the Fourteenth Amendment of the Constitution of the United States.

BONNER v. GORMAN, 213 U.S. 86, 53 L. ed. 709;

AMERICAN RAILWAY EXPRESS CO. v. KENTUCKY, 273 U.S. 269, 71 L. ed. 639;

WEST OHIO GAS CO. v. PUBLIC UTILITIES COMMISSION, 294 U.S. 63, 79 L. ed. 761.

In AMERICAN RAILWAY EXPRESS CO. v. KENTUCKY, 273 U.S. 269, 71 L. ed. 639, it is said, at page 273:

> "It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law."

V

THE CONSTITUTIONAL PRIVILEGES AND IMMUNITIES OF A CITIZEN ARE NOT ABRIDGED BY AN ERROR OF THE COURT IN THE CHARGE TO THE JURY IN A CRIMINAL CASE.

A substantial error in the charge to the jury in a criminal case does not deprive the prisoner of the equal protection of the laws.

DAVIS v. TEXAS, 139 U.S. 651, 35 L. ed. 300.

Errors of a state court in interpreting and applying the laws of that state furnish no basis for the claim that there has been a denial of the due process of law guaranteed by the Fourteenth Amendment to the Federal Constitution.

HOWARD v. KENTUCKY, 200 U.S. 164, 50 L. ed. 421.

The Constitution of the United States does not guarantee that the decisions of state courts shall be free from error or require that their pronouncements shall be consistent.

WORCESTER COUNTY TRUST CO. v. RILEY, 302 U.S. 292, 82 L. ed. 268.

Where the proceedings in the state court were conducted under the ordinary forms of criminal prosecutions, there was no denial of due process of law.

MILLER v. TEXAS, 153 U.S. 535, 38 L. ed. 812.

The due process clause of the Fourteenth Amendment does not operate to enforce upon the states a uniform code of criminal procedure; and it is for them to choose the methods and practices by which crime is brought to book, so long as they observe those ultimate dignities of man which the United States Constitution assures.

CARTER v. ILLINOIS, 329 U.S. 173, 91 L. ed. 172.

VI

THE PROHIBITION OF THE UNITED STATES CONSTITUTION AGAINST CRUEL AND UNUSUAL PUNISHMENT IS A LIMITATION UPON THE FEDERAL GOVERNMENT AND NOT UPON THE STATES.

COLLINS v. JOHNSTON, 237 U.S. 501, 59 L. ed. 1071.

In the opinion in this case, on page 510, it is stated:

> "The 8th Amendment is also invoked, with its prohibition of cruel and unusual punishments; but, as has been often pointed out, this is a limitation upon the Federal government, not upon the states."

CONCLUSION

The questions set out in the petition are not Federal questions, or, if they are, the questions are not substantial and are not of sufficient importance to warrant consideration by the United States Supreme Court. None of these questions were set up in the State courts as questions

arising under the Constitution of the United States. Therefore, the writ of *certiorari* should be denied.

Respectfully submitted,

HARRY McMULLAN,
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Counsel for the State of
North Carolina, *Respondent.*

APPENDIX

Section 1-282, GENERAL STATUTES OF NORTH CAROLINA:

Case on appeal; statement, service, and return.—The appellant shall cause to be prepared a concise statement of the case, embodying the instructions of the judge as signed by him, if there be an exception thereto, and the request of the counsel of the parties for instructions if there be any exception on account of the granting or withholding thereof, and stating separately, in articles numbered, the errors alleged. A copy of this statement shall be served on the respondent within fifteen days from the entry of the appeal taken; within ten days after such service the respondent shall return the copy with his approval or specific amendments indorsed or attached; if the case be approved by the respondent, it shall be filed with the clerk as a part of the record; if not returned with objections within the time prescribed, it shall be deemed approved: Provided, that the judge trying the case shall have the power, in the exercise of his discretion, to enlarge the time in which to serve statement of case on appeal and exceptions thereto or counter statement of case.

STATE v. DOVER, *Per Curiam* Order:

"The motion of the State to dismiss the appeal in this case is hereby granted for these reasons: (1) The case on appeal does not clearly state and number the exceptions as required by Rule 21 and by G. S. 1-282; and (2) the brief does not comply with Rule 27½ requiring the appellant to state the questions involved on the appeal in such a way as to enable the Court 'to obtain an immediate view and grasp of the nature of the controversy.' November 23, 1949.

"Ervin, J. For the Court."